

# HIPAA - Privacy - Oral Communications

TRICARE Management Activity, Electronic Business Policy & Standards

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## Highlights

- ◆ General Requirement
- ◆ Confidential Conversations with Other Providers and/or Patients Under the Rule
- ◆ "Reasonable Safeguards"
- ◆ Documentation of Oral Communications

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## HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA)

### *General Requirement*

The Privacy Rule applies to individually identifiable health information in all forms—electronic, written, oral, and any other. Coverage of oral (spoken) information ensures that information retains protections when discussed or read aloud from a computer screen or a written document. If oral communications were not covered, any health information could be disclosed to any person, so long as the disclosure was spoken. More specifically:

- ◆ Covered entities must reasonably safeguard protected health information (PHI) – including oral information – from any intentional or unintentional use or disclosure that is in violation of the Rule. They must have in place appropriate administrative, technical, and physical safeguards to protect the privacy of PHI. "Reasonable safeguard" means that covered entities must make reasonable efforts to prevent uses and disclosures not permitted by the Rule.
- ◆ Covered entities must have policies and procedures that reasonably limit access to and use of PHI to the minimum necessary given the job responsibilities of the workforce and the nature of their business. The minimum necessary standard does not apply to disclosures, including oral disclosures, among providers for treatment purposes. For a more complete discussion of the minimum necessary requirements, see the fact sheet titled "Minimum Necessary."
- ◆ Many health care providers already make it a practice to ensure reasonable safeguards for information – for instance, by speaking quietly when discussing a patient's condition with family members in a waiting room or other public area, and by avoiding using patients' names in public hallways and elevators. Protection of patient confidentiality is an important practice for many health care and health information management professionals; covered entities can build upon those standards of conduct to develop the reasonable safeguards required by the Rule.

### *Confidential Conversations with Other Providers and/or Patients Under the Rule*

The Privacy Rule is not intended to prohibit providers from talking to each other and to their patients. Provisions of this rule requiring covered entities to implement reasonable safeguards that reflect their particular circumstances and exempting treatment disclosures from certain requirements are intended to ensure that providers' primary consideration is the appropriate treatment of their patients. We also understand that overheard communications are unavoidable. For example, in a busy emergency room, it may be necessary for providers to speak loudly in order to ensure appropriate treatment. The Privacy Rule is not intended to prevent this appropriate behavior. The following practices are permissible, if reasonable precautions are taken to minimize the chance of inadvertent disclosures to others who may be nearby (such as using lowered voices or talking away from others):

- ◆ Health care staff may orally coordinate services at hospital nursing stations.
- ◆ Nurses or other health care professionals may discuss a patient's condition over the phone with the patient or a provider.
- ◆ A health care professional may discuss lab test results with a patient or other provider in a joint treatment area.
- ◆ Health care professionals may discuss a patient's condition during training rounds in an academic or training institution.



## ***"Reasonable Safeguards"***

Covered entities must have in place appropriate administrative, technical, and physical safeguards to protect the privacy of PHI. "Reasonable safeguards" mean that covered entities must make reasonable efforts to prevent uses and disclosures not permitted by the rule. Facility restructuring is not considered to be a requirement under this standard. In determining what is reasonable, potential effects on patient care, financial burden, and other such concerns have been taken into account.

For example, the Privacy Rule does not require the following types of structural or systems changes:

- ♦ Private rooms.
- ♦ Soundproofing of rooms.
- ♦ Encryption of wireless or other emergency medical radio communications, which can be intercepted by scanners.
- ♦ Encryption of telephone systems.

Covered entities must provide reasonable safeguards to avoid prohibited disclosures. The Rule does not require that all risk be eliminated to satisfy this standard. Covered entities must review their own practices and determine what steps are reasonable to safeguard their patient information.

Examples of the types of adjustments or modifications to facilities or systems that may constitute reasonable safeguards are:

- ♦ Pharmacies could ask waiting customers to stand a few feet back from a counter used for patient counseling.
- ♦ Providers could add curtains or screens to areas where oral communications often occur between doctors and patients or among professionals treating the patient.
- ♦ In an area where multiple patient-staff communications routinely occur, use of cubicles, dividers, shields, or similar barriers may constitute a reasonable safeguard. For example, a large clinic intake area may reasonably use cubicles or shield-type dividers, rather than separate rooms.

In assessing what is "reasonable," covered entities may consider the viewpoint of prudent professionals.

## ***Documentation of Oral Communications***

The Privacy Rule does not require covered entities to document any information, including oral information, that is used or disclosed for treatment, payment or health care operations (TPO). The Rule includes, however, documentation requirements for some information disclosures for other purposes. For example, some disclosures must be documented in order to meet the standard for providing a disclosure history to an individual upon request. Where a documentation requirement exists in the rule, it applies to all relevant communications, whether in oral or some other form. For example, if a covered physician discloses information about a case of tuberculosis to a public health authority as permitted by the Rule, then he or she must maintain a record of that disclosure regardless of whether the disclosure was made orally, by phone, or in writing.

The rule does not require covered entities to tape or digitally record oral communications, nor retain digitally or tape recorded information after transcription. But if such records are maintained and used to make decisions about the individual, they may meet the definition of "designated record set." For example, a health plan is not required to provide a member access to tapes of a telephone "advice line" interaction if the tape is only maintained for customer service review and not to make decisions about the member.